FILED

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No. _____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

BILL BURKETT,

Petitioner,

v.

WILLIAM W. GOODWIN, JACKIE TALIAFERRO, and ARCHIE M. MEADOR,

Respondents.

On Petition For Writ Of Certiorari To The Texas Court Of Appeals, Third District, At Austin

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the lower court err by broadly misapplying the *Feres* doctrine to deny subject matter jurisdiction in civil courts for common law claims against fellow servicemen when the tortious actions were not incident to service, thereby depriving Petitioner of equitable remedies set forth in federal case law that has carved out exceptions to *Feres v. U.S.*, 340 U.S. 135 (1950) in extreme and outrageous circumstances such as those that Petitioner has suffered?

LIST OF INTERESTED PARTIES

The following listed persons, associates, military agencies and government agencies and their counsel have an interest in the outcome of this litigation:

1. William Burkett is a resident of Baird, Callahan County Texas and a Petitioner.

2. William W. Goodwin is a resident of Austin, Travis County Texas and a Respondent.

3. Jackie Taliaferro is a resident of Austin, Travis County Texas and a Respondent.

4. Archie W. Meador is a resident of Austin, Travis County Texas and a Respondent.

5. David Van Os is the counsel of record for the Petitioner.

6. David Van Os & Associates, P.C. is Mr. Van Os' law firm and a professional corporation.

7. Greg Abbott is the Attorney General for the Texas Attorney General's office, which is representing Respondents.

8. Andy Taylor is the First Assistant Attorney General for the Texas Attorney General's office, which is representing Respondents.

9. Linda S. Eads is the Assistant Attorney General for Litigation for the Texas Attorney General's office, which is representing Respondents.

10. Nelly R. Herrera is the Chief, Tort Litigation Division of the Texas Attorney General's office, which is representing Respondents.

11. Kamilla L. Stokes is the Assistant Attorney General who represented Respondents before the Texas Court of Appeals, Third District, at Austin and the Texas Supreme Court.

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The Texas Court of Appeals, Third District, at Austin's opinion (by Justices Aboussie, B.A. Smith and Puryear) affirming the decision of the 126th District Court of Travis County (by the Honorable Scott H. Jenkins, Judge Presiding), is cited as 2002 WL 1804915, No Publication, Tex.App. – Austin, Aug. 8, 2002, and is reproduced at App. 1.

The 126th District Court of Travis County, Judge Scott H. Jenkin's Order granting Respondent's Motion for Summary Judgment is published as No. GN000159, and is reproduced at App. 10.

The Texas Supreme Court's denial of rehearing is reproduced at App. 11.

STATEMENT OF THE BASIS FOR JURISDICTION

This petition presents a federal question of the proper application and/or continued utility of *Feres v. U.S.*, 340 U.S. 135 (1950). Petitioner William Burkett was a member of the Texas Army National Guard (TARNG). Respondents were also members of the Guard and served as Petitioner's superiors. Respondents Meador and Goodwin were Plaintiff's immediate supervisors and had the obligation to authorize Petitioner to receive medical attention. Respondent Taliaferro was the Director of Personnel, who processed medical claims and incapacitation requests for the TARNG. Petitioner sued Respondents for damages arising from his personal injuries that were proximately caused by Respondents' tortious behavior. Petitioner claims Respondents are personally liable for his injuries that stemmed

from Respondents' administrative decisions that deliberately delayed Petitioner from receiving necessary medical care.

In the 126th Judicial District Court, Travis County, Texas the Petitioner had clear standing to sue Respondents personally for the intentional infliction of emotional distress, interference with contract, and intentional interference with property rights. Petitioner's case for recovery is predicated on common law, state grounds for the intentional acts of the Respondents. The medical care that Petitioner received subsequent to Respondents' actions has not remedied their violations, nor should the State be accountable for them. The sole parties responsible for these malicious and intentional acts are Respondents.

Respondents filed a Motion for Summary Judgment and the Honorable Scott Jenkins, Presiding Judge, 126th Judicial District Court, Travis County Texas granted Respondents' Motion for Summary Judgment on April 23, 2001. Petitioner appealed to the Texas Court of Appeals, Third District, at Austin, which affirmed the district court's judgment on August 8, 2002 in a decision before Justices Aboussie, B.A. Smith and Puryear, and which was written by Puryear. Petitioner appealed to the Texas Supreme Court which denied Petitioner's petition for discretionary review on October 31, 2002. *See* App. 11.

The federal question sought to be reviewed by the Supreme Court of the United States was timely raised in the court of first instance and in the appellate courts, pursuant to Rule 14(1)(g)(i) of this Court. In Respondents' Motion for Summary Judgment in the 126th Judicial District of Travis County, the Texas Attorney General

raised intra-military immunity under *Feres* and its progeny. The Petitioner's Response distinguished these cases and argued for subject matter jurisdiction. The trial court granted Respondents' motion. *See* App. 10. On appeal, the Texas Court of Appeals, Third District, at Austin addressed intra-military immunity, upholding the lower court. *See* App. 1. The appellate court concluded that the Respondents' "alleged wrongdoing was within the course of activity incident to military service," holding that "Burkett failed to allege an adequate basis for civilian court jurisdiction and his claims are not justiciable in a civilian court." *See* App. 1. Therefore, the federal question has been correctly raised so that the Supreme Court of the United States has jurisdiction to review the judgment on a Petition for Writ of Certiorari.

This Petition for Writ of Certiorari has been filed within 90 days after entry of the order denying discretionary review by the Texas Supreme Court, and is therefore timely under Rule 13.3 of this Court. *See* App. 11.

Petitioner now seeks a Writ of Certiorari from the Supreme Court of the United States pursuant to 28 U.S.C. § 1257. 28 U.S.C. § 1257 states in relevant part:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or

> statutes of, or any commission held or authority exercised under, the United States.

Petitioner requests that the Supreme Court of the United States grant his Petition for Certiorari because the Texas Court of Appeals, Third District, Austin, Texas has decided an important question of federal law that has not been, but should be, settled by this Court. Petitioner's request for Writ of Certiorari presents a compelling issue with respect to clarification of the exceptions to the application of the *Feres* doctrine, which confers immunity upon service personnel who have been sued personally by subordinates who alleged wrongdoing.

In *Feres*, the United States Supreme Court initiated the policy of deferring to military judgment and held that a soldier may not recover under the Federal Tort Claims Act for injuries that "arise out of or are in the course of activity incident to service." The holding was based upon concern for the "peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Torts Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty." *Texas Adjutant General's Dept. v. Amos*, 54 S.W.3d 74, 77 (Tex.App. – Austin, 2001), *citing U.S. v. Brown*, 348 U.S. 110 (1954).

The 126th District Court erred when it granted Respondents' Motion for Summary Judgment, which, despite notable exceptions to the *Feres* doctrine, incorrectly applied the *Feres* doctrine to bar Petitioner's common law tort claims for Respondents' conduct, which was so outrageous as to be wholly outside of any military duties for the Texas Air National Guard.

Petitioner requests that the Supreme Court grant his Petition for Writ of Certiorari because this case presents a compelling question of law affecting military personnel, who have suffered serious intentional torts inflicted by other service personnel, whose claims have been barred by *Feres* and its progeny, thus effectively denying them a civil remedy against a tortfeasor whose actions were outside the scope of military service.

Petitioner requests that the Supreme Court grant his Petition for Writ of Certiorari because this case presents a compelling question, of servicemen's rights to equitable relief in military matters, that has not been, but should be, settled by the Supreme Court of the United States. Without Supreme Court intervention, the basic rights protected by law for military personnel shall be completely nullified because *Feres* and its progeny may be used as a formal immunity insulating wrongdoers from state law claims for conduct thinly veiled as "incident to service," even when the conduct is unauthorized and so egregious that it would be actionable in civilian courts.

STATUTES AND RULES INVOLVED

National Guard Regulation (NGR) 40-3, "Medical Care for Army National Guard Members," provides for the procedures by which members of the Army National Guard obtain medical care. Due to its length, NGR 40-3 is reproduced in its entirety at App. 12.

STATEMENT OF THE CASE

At the procedural juncture of this case, all of the Petitioner's allegations must be taken as true. Petitioner was an active member of the Texas National Guard before being medically retired as a result of a disease contracted while in Panama on active duty (R. 70). Petitioner sought emergency medical treatment from a military facility, as was his right. However, Respondents, through administrative means, deliberately and maliciously deprived him of medical care until a Congressman intervened and assisted Petitioner. Petitioner filed personal injury suit in state district court, suing Respondents individually for common law tort claims. The district court judge granted Respondents' Motion for Summary Judgment, broadly applying *Feres* and its progeny to provide Respondents' with military immunity from private suit. *See* App. 10. The Texas Court of Appeals, Third District, upheld the lower court's conclusion, and the Texas Supreme Court denied rehearing. *See* App. 1.

As of January 17, 1998, Petitioner was serving on active duty in the Texas National Guard (R. 70). Although he had been on a duty assignment in Panama under federal travel orders, he was performing duty orders for the Texas National Guard. On January 17, 1998, he returned to Abilene, Texas from his assignment in Panama when he became ill and collapsed at the Abilene Regional Airport in the baggage claim area (R. 70).

Initially, Petitioner believed he suffered from fatigue and the flu, but his health concerns became more grave with time. He attempted to notify his supervisor, Respondent Meador, about his illness on January 20, 1998. After being unable to contact Meador, Petitioner notified Colonel

John Wells, Respondent Meador's second in command, describing his ill health (R. 70). Colonel Wells told Petitioner to seek treatment at Dyess Air Force Base near Abilene, and Colonel Wells notified Respondents. *See* App. 48-50.

Petitioner's health deteriorated. He suffered from severe and constant fever, nausea, dizziness, and seizures. Petitioner related these facts to Colonel Wells and Petitioner sought admittance to Dyess base hospital on January 26, 1998. *See* App. 48-50. There, he was told that he needed a commander's authorization to be granted health care.

Petitioner attempted to access the proper chain of command and obtain necessary authorization from Respondents who denied him their assistance and forced him to undergo a line of duty investigation, delaying his admission to the military hospital. Petitioner ultimately received medical care but only due to the intervention of U.S. Congressman Charles Stenholm (R. 71). Today, Petitioner continues to suffer from debilitating headaches, seizures, nausea, and mobility impairments that a neurological specialist concluded that Petitioner suffered incident to a febrile illness, such as meningoencephalitis, which Petitioner may have contracted on his return from Panama in 1998 (R. 71).

Not only was Petitioner's health deteriorating, but he could not afford private medical care. Petitioner's farm had been negatively impacted by drought conditions and Petitioner was in the process of losing the farm and being forced into bankruptcy proceedings.

Respondents knew of Petitioner's health crisis and deliberately withheld authorization for medical care. They did so by refusing to provide Dyess Air Force Base with

confirmation that Petitioner was on active duty. Petitioner's duty status was well known; however, Respondents forced Petitioner to undergo a line-of-duty investigation that delayed his medical treatment. By doing so, Respondents acted outside of their military capacity because their duty to authorize medical care is a non-discretionary, ministerial task. The right to medical treatment is an entitlement, not subject to discretionary review by anyone in the injured person's unit, or the command structure above that. *See* App. 43. If anyone hinders such medical treatment, they are operating outside the legitimate purview of the relevant military regulations and without authority (R. 90).

As a result of Respondents' refusal to provide clearance and confirmation of Petitioner's active duty status, he suffered a lengthy delay before obtaining a medical diagnosis and military medical care. By the time Petitioner received military health care, due to the intervention of his Congressman, the disease had taken its toll, leaving him disabled and unable to return to military duty or civilian employment. Petitioner claims that as a direct and proximate result of Respondents' tortious conduct, he suffered various personal injuries. Petitioner argues that Respondents are amenable to suit for common law torts committed while on active duty because Respondents' actions were so outrageous as to take them out of the scope of their employment, excluding them from intra-military immunity afforded by the *Feres* doctrine.

ARGUMENT

I. The appellate court erred when it denied subject matter jurisdiction because significant exceptions to the *Feres* doctrine apply to the instant case thereby making it amenable to suit in a civilian court of law.

Respondents are members of the Texas Air National Guard, and, as such, serve in a branch of the federal military service. Therefore decisions addressing regular military service are appropriate to review in determining the justiciability of claims brought by Guard members. In *Feres v. U.S.*, 340 U.S. 135 (1950), the United States Supreme Court held that claims brought by military personnel for injuries arising from or in the course of activity incident to military service are nonjusticiable. *Feres* at 136. The Supreme Court reasoned in later cases that "Civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the Military Establishment." *Chappell v. Wallace*, 462 U.S. 296, 300 (1983).

Feres and its progeny teach that the state or federal government cannot be sued for the **negligence of military personnel carrying out military orders**. *Feres* holds that military personnel may not recover under the Federal Tort Claims Act for injuries incident to military service. This conclusion is premised upon three contentions. First, the Court sought to limit intrusion by civilian courts into the uniquely federal nature of the relationship between the federal government and members of the armed forces. Second, the Court tacitly encouraged the use

of alternative forms of compensating injured military personnel through the Veterans' Benefit Act. Third, the Court noted the harm that would come to military order and discipline if subordinates could sue for negligent acts of omissions that arose incident to service.

Despite the *Feres* court's protectivist stance generally immunizing military personnel from suit, the Circuit Courts of Appeals have carved out broad exceptions to *Feres* and its progeny, restricting their application and liberally construing justiciability in circumstances where the misconduct alleged is egregious and barring admission to a civilian court would work an injustice. In *Brown v. U.S.*, 739 F.2d 362 (8th Cir. 1984), the Court permitted a plaintiff to pursue a civil rights action against fellow soldiers who participated in a mock lynching. In so doing, the *Brown* court observed that allowing the *Feres* doctrine to bar the Brown suit "would insulate from liability the very breakdown of military discipline." *Brown* at 369.

Other courts also have created exceptions to an otherwise mechanical application of the *Feres* rule, so that suits sounding in tort may be adjudicated in a civilian forum. In *Day v. Massachusetts Air National Guard,* 167 F.3d 678 (1st Cir.1999), the court permitted a plaintiff to recover against individuals who subjected the plaintiff to a severe form of hazing. The *Day* court reasoned that barring the suit under *Feres* would deprive service personnel, who were victims of intentional wrongdoing, from recovery against perpetrators acting beyond the scope of military authority and attempting to shield themselves with claims of immunity.

Likewise, the Ninth Circuit Court of Appeals permitted a plaintiff to sue fellow military personnel for breaking

into an office in order to obtain material that would damage the plaintiff's career. *See Lutz v. Secretary of the Air Force*, 944 F.2d 1477 (9th Cir.1999). Recognizing the seriousness of the conduct and the injustice that would be worked if the courts failed to hear such claims in civilian courts, the *Brown*, *Day* and *Lutz* courts found the issues to be justiciable.

The *Brown*, *Day* and *Lutz* exceptions to the *Feres* doctrine apply to the instant case. The Petitioner is suing Respondents personally in tort for common law, state claims. The Petitioner is not alleging negligence. Instead, he is claiming that deliberate, willful and knowing cruelty motivated his superiors at the Texas National Guard when they obstructed his access to medical care. Without access to civilian courts, Petitioner will be deprived of a forum in which to litigate his case and will suffer an injustice beyond the ones that he has already endured.

II. The courts below erred when they failed to correctly apply exceptions to the *Feres* doctrine in the case at bar despite the fact that Respondents' actions were not within the scope of their employment.

Petitioner's case is distinguishable from most *Feres* cases in that Petitioner seeks to recover against individuals for their intentional torts rather than against the government for the negligence of military officers. The concern of *Feres* and its progeny for the integrity of military command structure and military discipline is not implicated by this case. Here, Respondents failed to discharge a mandatory, non-discretionary duty clearly set forth in National Guard regulations. In his deposition,

George Conn, formerly Chief Warrant officer of the Texas Air National Guard, stated that

> "The right to medical treatment in this situation is an entitlement, not subject to discretionary review by anyone in the injured person's unit, or the command structure above that. If anyone hinders such medical treatment, they are operating outside legitimate purview of the relevant military regulations and without authority." *See* App. 48.

Respondents were under an obligation to check Petitioner's status so that the health care facility could immediately administer medical treatment. The Respondents were under a mandatory duty, which afforded them absolutely no opportunity to exercise their discretion, and they knowingly, willfully, and deliberately failed to discharge that non-discretionary duty. They required Petitioner to undergo an unnecessary line of duty investigation prior to receiving medical care.

The Respondents' conduct was so completely beyond and outside any military authority or discretion as to have been outside the scope of military duty, outside any military duty, outside any military capacity, and not incident to military duty. Instead, the Respondents acted purely as individuals, not as military officers, albeit cloaking their activities with military authority and abusing their offices through pretense in order to deliberately and cruelly wreak havoc upon Petitioner's life. For these reasons, the exceptions to *Feres* should have been applied, enabling Petitioner to sue Respondents personally in civil court for common law claims.

While the Plaintiff's injury was "incident to military service," the Respondents' misconduct was not. The Petitioner's injury is viewed as "incident to military service" because he was on active duty, was subject to the authority of superior officers, and was denied access to mandatory health care by his officers' deliberate refusal to fulfill a non-discretionary task. The Respondents' misconduct was so patently unconnected to their official duties as to fall outside the scope of employment. Respondents had a duty to fulfill and knew the regulations requiring them to fulfill that duty. Instead, they deliberately chose to disregard the regulations.

Feres' zone of protection is limited to immunizing actions and decisions involving military authority from scrutiny by civilian courts, and *Feres* was not intended to protect the personal actions of individuals whose acts in no way implicate the function or authority of the military. *Feres*' progeny has held that civilian courts may not second-guess the judgment of military authorities in personnel actions such as a claim that a discharge of an officer was in retaliation under the Whistleblower Act. *Newth v. Adjutant General's Dept. of Texas*, 883 S.W.2d 256 (Tex.App. – Austin 1994, writ denied). However, the *Newth* rule is inapplicable to the instant case because the Respondents were not operating in an area of judgment and there was nothing to "second-guess." Here, Respondents' actions did not involve military decision-making or relate to a military mission. There is no discretion, according to National Guard regulations, that anyone in the command structure has to prevent someone who is injured or diseased in the line of duty from receiving emergency medical care. Therefore, the sanctity of military decision-making has not been violated by Petitioner's case and any civilian

court hearing this matter would not be intervening in military decision-making.

Further, the Respondents' willful failure to fulfill a non-discretionary duty takes Respondents' acts out of the scope of their employment. Their personal vendetta against Petitioner was not incident to military service. *See* App. 40-41. Military regulations expressly set forth the procedures by which authorization is provided to servicemen requiring medical care for illnesses arising during military service. *See* App. 12-32, 43. Respondents should be prevented from misidentifying their individual tortious acts as duties performed incident to military service – they acted as civilians and deserve to be amenable to suit in a civilian court. The lower courts erred when they failed to apply exceptions to *Feres* in the case at bar. For these reasons, the Petitioner's request for Writ of Certiorari should be granted.

III. Limitations to *Feres*, created by the various Circuit Courts of Appeal, are critical to providing equitable relief for servicemen, and these exceptions are long overdue for clarification by the United States Supreme Court so that compelling public policy considerations may be fully addressed.

Limitations to *Feres* deserve reexamination by the United States Supreme Court for several important public policy reasons. The rationale underlying *Feres* has become obsolete and no longer appears as persuasive. *Day* at 683. This is especially true as courts have refused to grant absolute deference to the chain of command and hence have become more willing to grant equitable relief in military matters during recent years. *Id.* Second, nearly

any suit that implicates military judgments and decisions, no matter how obliquely, runs the risk of colliding with *Feres*. If the application of the doctrine is unchecked, courts will unilaterally expand wrongdoers' immunity from the reach of common law. Thus, meritorious cases will go unheard.

Further, if some courts apply *Feres* to bar common law suits against military personnel while other courts permit exceptions, the decisions will lack uniformity. Uniformity requires comparable decisions under like circumstances. Without uniformity, there will be no precedent and no predictability. There will be no spirit and habit of fairness, justice and right dealing upon which the public may rely.

Lastly, clarifying the limitations of *Feres* would be in the interests of judicial economy, enabling plaintiffs to determine whether and under what circumstances common law suits may be heard and thus make the best use of judicial resources. Judicial economy implicates the concerns of accessibility to the courts, efficiency, timeliness of adjudication, and fairness. *Feres* has not yet evolved into an immunity for all individuals facing state law claims. However, a broad application of *Feres*, such as the one employed by the lower courts' holding in this case, would require the deprivation of access to civil remedies for military service personnel who were victims of serious intentional torts inflicted by other members of the military.

Feres bars negligence claims against the government; however, it should not be extended and transformed into a formal immunity baring state law claims against individuals for conduct, however unauthorized and deliberate, that causes injury to a plaintiff incident to his or her

military service. By preventing plaintiffs from suing fellow servicemen in tort for intentional acts beyond the scope of military duties, the courts would be guilty of complete indifference to the individual plaintiffs, themselves, for whom the courts were created to provide equitable remedies. Such a bar would permit military personnel to act unjustly behind a shield of immunity. If *Feres* is to be so broadly applied, the courts should be required to show evidence that without it the sanctity of the armed forces will be seriously threatened.

Thus far, there is no consensus in the various Circuit Courts of Appeal in favor of extending *Feres* to state law claims. *Day* at 684. Several Circuit Courts of Appeal have clearly articulated and applied exceptions. *See Day*, *Brown*, *Lutz*, *supra*. In the recent past, *Feres* has been questioned by various Justices on the Supreme Court, including Scalia, Brennan, Marshall, Stevens[1] and O'Connor.[2]

CONCLUSION

This petition presents a federal question of the proper application and/or continued utility of *Feres v. U.S.*, 340 U.S. 135 (1950). The fundamental issue at the heart of Petitioner's case is whether the lower courts erred by broadly misapplying the *Feres* doctrine to deny subject

[1] *See U.S. v. Stanley*, 483 U.S. 669 (1987). Scalia dissented, joined by Brennan, Marshall and Stevens.

[2] *See U.S. v. Johnson*, 481 U.S. 681 (1987). O'Connor concurred in part and dissented in part.

matter jurisdiction in civil courts for common law claims against fellow servicemen when the tortious actions were not incident to service, thereby depriving Petitioner of equitable remedies set forth in case law that has carved out exceptions to *Feres* in extreme and outrageous circumstances such as those that Petitioner has suffered. The Petitioner has been denied access to a civilian court and equitable remedies by the lower courts' failure to apply significant exceptions to the *Feres* doctrine despite the fact that Respondents' actions were not, due to their non-discretionary nature, incident to service. The Supreme Court of the United States should reject the lower courts' application of *Feres* and reconsider its continued utility in light of important public policy concerns.

For all the foregoing compelling reasons, the Petitioner respectfully urges the Court to grant his Petition for Writ of Certiorari.

Respectfully submitted,

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TEXAS COURT OF APPEALS,
THIRD DISTRICT, AT AUSTIN

JUDGMENT RENDERED AUGUST 8, 2002

NO. 03-01-00302-CV

Bill L. Burkett, Appellant

v.

William W. Goodwin, Jackie L. Taliaferro and
Archie M. Meador, Appellees

APPEAL FROM 126TH DISTRICT COURT OF TRAVIS COUNTY BEFORE CHIEF JUSTICE ABOUSSIE, JUSTICES B. A. SMITH AND PURYEAR AFFIRMED – OPINION BY JUSTICE PURYEAR

THIS CAUSE came on to be heard on the record of the court below, and the same being considered, because it is the opinion of this Court that there was no error in the trial court's judgment: **IT IS THEREFORE** considered, adjudged and ordered that the judgment of the trial court is in all things affirmed. It is **FURTHER** ordered that the appellant pay all costs relating to this appeal, both in this Court and the court below; and that this decision be certified below for observance.

App. 2

**TEXAS COURT OF APPEALS,
THIRD DISTRICT, AT AUSTIN**

NO. 03-01-00302-CV

Bill L. Burkett, Appellant

v.

William W. Goodwin, Jackie L. Taliaferro and
Archie M. Meador, Appellees

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 126TH JUDICIAL DISTRICT NO. GN000159, HONORABLE SCOTT H. JENKINS, JUDGE PRESIDING

Bill Burkett, a retired Lieutenant Colonel in the Texas Army National Guard, brought a personal injury action against appellees, William Goodwin, Jackie Taliaferro, and Archie Meador, all of whom were his superior officers.[1] Burkett appeals from the trial court's order dismissing his lawsuit. While Burkett sets out his appellate issue as "whether the court below erred in granting summary judgment to the defendants-appellees," he raises the following contention in the argument portion of his brief: Because he commenced his claims against the appellees in

[1] Goodwin was chief of staff for the Adjutant General for the State of Texas, Taliaferro was director of military personnel responsible to the Adjutant General for all matters pertaining to the overall management and supervision of the Directorate of Military Personnel, and Meador, Burkett's immediate supervising officer, served as director of plans, operations and training, and military support.

their individual capacities only, (1) his claims were justiciable in a civilian court and (2) the appellees were not entitled to statutory immunity under Texas Government Code section 431.085; therefore, the court erred in dismissing his lawsuit. *See* Tex. Gov't Code Ann. § 431.085(a) (West 1998). We will liberally construe Burkett's brief and will focus our review on this contention. *See* Tex. R. App. P. 38.9. We will affirm the trial court's order of dismissal.

Background

Burkett alleged that on January 17, 1998, he collapsed at the Abilene airport on his return home from an active duty assignment in Panama with the United States Army. He alleged that his collapse was caused by a tropical disease he contracted while on active duty in Panama. After several days of illness, Burkett went to Dyess Air Force Base in Abilene seeking medical care. Individuals at the medical facility's admissions office told Burkett that they needed clearance or confirmation of Burkett's active duty status from the Texas Army National Guard before he could be admitted for medical care. Burkett alleged that pursuant to Texas Army National Guard regulation 7-3, had any of the appellees, who were in command positions with the Texas Army National Guard, provided the admissions office at Dyess with clearance or confirmation, he could have received prompt medical attention at Dyess. He asserted that based on Guard regulations, it was Goodwin's, Taliaferro's and Meador's ministerial duty to provide clearance or confirmation of his active duty status to Dyess and that they were without discretion or authority to refuse to provide the clearance or confirmation of his status to Dyess.

Burkett alleged that over the next four months Goodwin, Taliaferro and Meador willfully and maliciously refused to provide Dyess with clearance or confirmation of his duty status thereby denying him access to military medical care. Burkett alleged that these three individuals' conduct was "so completely beyond and outside any military authority or discretion as to have been outside the scope of military duty, outside any military duty, outside any military capacity, and not incident to military duty." Burkett alleged that they "acted purely as individuals, not as military officers, albeit pretending to have military authority and abusing their offices through such pretense in order to willfully and maliciously wreak havoc upon [Burkett's] life." As a result of their refusal to provide clearance and confirmation of Burkett's active duty status, he was unable to obtain a medical diagnosis or military medical care for his debilitating illness. Burkett finally received access to military health care due to the intervention of a United States Congressman. By the time he received military health care, the disease had ravaged his body, and left him disabled and unable to return to either military duty or gainful civilian employment. Burkett alleged that as a direct and proximate result of Goodwin's, Taliaferro's and Meador's tortious conduct, he suffered various personal injuries. Further, he alleged that because their actions were willful and malicious, he was entitled to exemplary damages.

Goodwin, Taliaferro and Meador moved to dismiss the case for want of jurisdiction and moved for summary judgment. They contended that the trial court was without subject matter jurisdiction over the case because the military personnel matter at issue was not justiciable in civilian courts. *See Feres v. United States,* 340 U.S. 135,

146 (1950); *Newth v. Adjutant Gen.'s Dep't,* 883 S.W.2d 356, 358 (Tex. App. – Austin 1994, writ denied). Additionally, they moved for summary judgment on the grounds that they were statutorily immune for their alleged actions. Tex. Gov't Code Ann. § 431.085 (West 1998). Burkett responded to the appellees' motions contending that indeed the court had subject matter jurisdiction because he was suing Goodwin, Taliaferro and Meador in their individual capacities and not as military personnel. Burkett contended that due to the appellees' intentional failure to discharge a mandatory, non-discretionary duty under Texas Army National Guard regulation procedure 7-3 to confirm Burkett's duty status to the medical facility at Dyess, he suffered damages for which he could recover at common law. The trial court dismissed Burkett's case.

Discussion

We first address whether the trial court erred in dismissing Burkett's case on the ground that his claims were not justiciable in a civilian court.

Standard of Review

In examining whether a dismissal for want of jurisdiction is appropriate, we "construe the pleadings in favor of the plaintiff and look to the pleader's intent." *See Texas Ass'n of Bus. v. Texas Air Control Bd.,* 852 S.W.2d 440, 446 (Tex. 1993). We are obliged to take as true the allegations in Burkett's petition and construe them favorably to his position. *See id.* We must reverse the dismissal unless the petition affirmatively demonstrates that no cause of action exists or that the plaintiff's recovery is barred. *See Dorchester Master Ltd. P'ship v. Dorchester,* 914 S.W.2d 696,

703 (Tex. App. – Corpus Christi 1996, writ granted w.r.m.); *Ramirez v. Lyford Consol. I.S.D.,* 900 S.W.2d 902, 906 (Tex. App. – Corpus Christi 1995, no writ). A court is without jurisdiction only when the court can determine from the allegations of a pleading that, even by amendment, no cause of action can be stated consistent with the facts alleged. *Ramirez,* 900 S.W.2d at 906 (citing *Bybee v. Fireman's Fund Ins. Co.,* 331 S.W.2d 910, 917 (Tex. 1960)).

Justiciability of National Guard Disputes

Burkett's petition alleged that the appellees failed to abide by National Guard regulations, that is, they failed to confirm Burkett's duty status to the Dyess military medical facility, and, as a result, Burkett suffered damages. Burkett alleged that despite the fact that at all times appellees were National Guard officers and the act about which he complains is governed solely by National Guard regulations, the appellees' alleged actions or failure to act regarding particular regulations took them outside their status as National Guard officers making appellees subject to the jurisdiction of civilian courts. We disagree.

Because National Guard members serve in a branch of the federal military service, decisions regarding the regular military service are relevant in determining the proper scope of judicial inquiry into claims brought by Guard members. *Holdiness v. Stroud,* 808 F.2d 417, 422 (5th Cir. 1987). We are mindful of the well-established principle announced in *Feres v. United States,* that claims brought by military personnel for injuries arising from or in the course of activity incident to military service are nonjusticiable. 340 U.S. at 136; *see also United States v. Stanley,* 483 U.S. 669, 683-84 (1987); *Chappell v. Wallace,*

462 U.S. 296, 305 (1983); *Holdiness,* 808 F.2d at 423; *Crawford v. Texas Army Nat'l Guard,* 794 F.2d 1034, 1035 (5th Cir. 1986); *Texas Adjutant Gen.'s Dep't v. Amos,* 54 S.W.3d 74, 79 (Tex. App. – Austin 2001, pet. denied); *Newth,* 883 S.W.2d at 357. While the Supreme Court has not held that military personnel are barred from all redress in civilian courts for wrongs suffered in the course of military service, the "special relationships that define military life have 'supported the military establishment's broad power to deal with its own personnel'" instead of involving civilian courts in such decisions. *Chappell,* 462 U.S. at 305. "The permissible range of lawsuits by present or former servicemen against their superior officers is, at the very least, narrowly circumscribed." *Crawford,* 794 F.2d at 1035. "Civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the Military Establishment." *Chappell,* 462 U.S. at 300.

Burkett contends that these cases do not apply because here the appellees were not operating in an area where they could exercise discretion and there was nothing to second-guess. Burkett contends that based upon the Texas Army National Guard regulation procedure 7-3, the appellees were under a mandatory duty to confirm his duty status to the medical facility at Dyess and they deliberately failed to discharge that nondiscretionary duty.

Burkett suggests that the facts here are analogous to those in *Brown v. United States,* 739 F.2d 362 (8th Cir. 1984), *Day v. Massachusetts Air National Guard,* 167 F.3d 678 (1st Cir. 1999), and *Lutz v. Secretary of the Air Force,*

944 F.2d 1477 (9th Cir. 1999). In *Brown,* the plaintiff serviceman alleged he suffered injuries from a mock lynching; in *Day,* the plaintiff serviceman alleged he suffered injuries from a hazing incident described by the trial court as "despicable"; in *Lutz,* the plaintiff servicewoman alleged she suffered injuries when the defendants broke into her office, took personal papers and disseminated them to other military personnel with the intent to injure her reputation and career. *Brown,* 739 F.2d at 364; *Day,* 167 F.3d at 680; *Lutz,* 944 F.2d at 1478. In these three cases, the courts reviewed the plaintiffs' allegations under *Feres* and concluded that the plaintiffs' claims for injuries arose from situations that were not within the course of activity incident to military service. Due to the "extreme nature of the alleged conduct and its total antipathy to any conceivable military purpose," there was no relevant relationship among the activity, injury and military service. *Brown,* 739 F.2d at 368.

Conversely, here the issue is whether Burkett's superior officers properly followed a Texas Army National Guard regulation related to a request for medical care at a military medical facility. Despite the fact that Burkett sued appellees in their individual capacities only, his pleadings complain about his superior officers' conduct in relation to a military personnel action pursuant to military regulations which can only arise when Texas Army National Guard officers are on active duty. Burkett's pleadings alleged wrongdoing that was within the course of activity incident to military service. We hold that Burkett failed to allege an adequate basis for civilian court jurisdiction and his claims are not justiciable in a civilian court.

Conclusion

We overrule Burkett's contention and affirm the trial court's order of dismissal.[2]

David Puryear, Justice

Before Chief Justice Aboussie, Justices B. A. Smith and Puryear

Affirmed

Filed: August 8, 2002

Do Not Publish

[2] Having determined that the trial court did not err in dismissing the case, we need not address Burkett's contention relating to statutory immunity as that issue is not necessary to the disposition of this appeal. *See* Tex. R. App. P. 47.1.

NO. GN-000159

BILL L. BURKETT, Plaintiff, vs. WILLIAM W. GOODWIN, JACKIE L. TALIAFERRO, and ARCHIE M. MEADOR, Defendants	§ § § § § § § §	IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS 126TH JUDICIAL DISTRICT

FINAL ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS FOR LACK OF JURISDICTION

(Filed Apr. 26, 2001)

On this the 23rd day of April, 2001, came on to be heard Defendant's Motion for Summary Judgment and Motion to Dismiss for Lack of Jurisdiction. The Court, after considering said motion, hearing arguments from counsel, and reviewing the pleadings on file, is of the opinion the motion should be GRANTED.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED Plaintiff's cause of action is hereby dismissed.

SIGNED on this the 23rd day of April, 2001.

/s/ Scott Jenkins
JUDGE PRESIDING

[SEAL] **THE SUPREME COURT OF TEXAS**
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

October 31, 2002

Ms. Lisa Smith
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Ms. Kamilla Lane Stokes
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P.O. Box 12548
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RE: Case Number 02-0880
Court of Appeals Number: 03-01-00302-CV
Trial Court Number: GN-000159

Style: BILL BURKETT
v.
WILLIAM W. GOODWIN, JACKIE L. TALIAFERRO AND ARCHIE M. MEADOR

Dear Counsel:

Today, the Supreme Court of Texas denied the petition for review in the above styled case.

Sincerely,
Andrew Weber Clerk
by /s/ Jessica L. Vlasac
Jessica L. Vlasac, Deputy

cc: Ms. Diane O'Neal, Clerk
Ms. Amalia Rodriguez-Mendoza

HEADQUARTERS
DEPARTMENT OF THE ARMY
Washington, DC, *15 December 1978*

National Guard Regulation)
)
No. 40-3)

Medical Services

MEDICAL CARE FOR ARMY NATIONAL GUARD MEMBERS

This is a complete revision of NGR 40-3 and contains changes throughout. Authority has been added to include care for National Guard members on FTTD for more than 30 days under Section 502f, Title 10, U.S. Code. Whenever the word "he" is used in this regulation, it is intended to include both the masculine and feminine genders unless otherwise indicated.*

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* This regulation supersedes NGR 40-3, 31 May 1972.

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1. General. This regulation outlines the medical care to which Army National Guard (ARNG) personnel not on active Federal service are entitled. It prescribes the policies and procedures for obtaining such care and establishes the responsibilities for the provisions of care. AR 40-3 applies to the ARNG except as modified herein.

2. Authority. Sections 318-320 of Title 32, U.S.C. and sections 502-505 of Title 32, U.S.C.

3. Policies. *a* Members of the ARNG are entitled to medical care for treatment of disease or injury only under the circumstances outlined in paragraph 6. Unit commanders should exercise extreme care when authorizing medical attention for ARNG personnel in order that funds will not be committed for unauthorized expenditures.

b. Army National Guard technicians who are injured in the scope of their ARNG civilian employment are not authorized medical care under this regulation, but are entitled to medical care under the Federal Employees Compensation Act chap 15 of title 5, U.S.C. administered by the Office of Workers' Compensation Programs.

c. Army National Guard members are entitled to medical care when ordered to perform duty under section 502, title 32, U.S.C., under the following circumstances:

(1) For a period of more than 30 days and they are disabled in line of duty from disease while so employed.

(2) For any period of time and they are disabled in line of duty from injury while so employed.

(3) In the instances outlined in (1) and (2) above, medical care and medical care benefits are authorized under paragraph 6.

4. State Responsibilities. *a.* Prior to the opening of annual training camps, the State military authorities are responsible for the arrangements for appropriate medical services. These arrangements will consist of medical care deemed necessary but not limited to that provided by the post, camp, or station.

b. Medical treatment facilities will be used in the following priority:

(1) National Guard

(2) Army, Navy, Air Force

(3) Other Federal facilities (Veterans' Administration hospitals, etc.)

(4) Civilians

5. Medical Care. *a. General.* The definitions of medical care; policies outlining the manner, conditions, procedures, and eligibility for care; and the sources from which medical care is obtained are enumerated in AR 40-3.

b. Qualifications.

(1) Professional personnel. Qualifications of civilian personnel to furnish medical care are prescribed in AR 40-3.

(2) Treatment facilities. The exclusion of certain civilian facilities to provide medical care, and reasons therefore, are outlined in AR 40-3.

c. Payment of accounts. Statements of charges for payment of services rendered by civilian sources will be vouchered in accordance with instructions in AR 40-3 and will be forwarded as outlined in paragraph 11 of this regulation.

d. Elective care. Elective care in civilian medical treatment facilities or by civilian medical and dental personnel is not authorized. The medical care authorized by this regulation is limited to that necessary for the treatment of the disease or injury incurred under the conditions outlined herein.

e. Prosthetic devices, prosthetic dental appliances, hearing aids, spectacles, orthopedic footwear, and orthopedic appliances. These items will be furnished –

(1) By Army medical facilities –

(a) When required in the course of treatment of a disease or injury contracted or incurred in line of duty.

(b) When required to replace items that have been lost, damaged, or destroyed while engaged in training under sections 502-505 of title 32, U.S.C., not the result of negligence or misconduct of the individual concerned.

(2) By civilian sources –

(a) Under the circumstances enumerated in (1)*(a)* above, after approval of the USPFO's of the respective States.

(b) Under the circumstances enumerated in (1)*(b)* above in the case of prosthetic devices, prosthetic dental appliances, hearing aids, orthopedic footwear, and orthopedic appliances when the unit commander determines that

1. Member is far removed from a Federal medical treatment facility.

2. Lack of such device would interfere with the individual's performance of duty as a member of the ARNG.

3. Approval must be obtained from the USPFOs of the respective States prior to replacement.

(c) Under the circumstances enumerated in (1)*(b)* above in the case of spectacles under a determination by the unit commander that

1. The member is far removed from military medical treatment facility.

2. The member has no other serviceable spectacles.

3. Lack of a suitable pair of spectacles would interfere with the member's performance of duty as a member of the ARNG.

4. Charges for replacement of spectacles will not exceed the rates stated in AR 40-330. Charges for

replacement or repair by civilian sources over and above the allowable rates will be paid from the individual's personal funds.

5. In cases covered by (2)*(b)* and *(c)* above, the unit commander will furnish a statement to support the voucher as follows:

STATEMENT

_____, _____, _____,
Name Rank SSN

_____, _____, while engaged in training under section *(502) *(503) *(504) *(505) of title 32, United States Code sustained the *(loss) *(damage) *(destruction) of his spectacles _____ _____

_____
description

_____
of loss, damage or destruction (type of lens and frames) not the result of misconduct or negligence on his part. The *(repair) *(replacement) by civilian sources was required since the member was removed from military medical treatment facility and the lack of *(repair) *(replacement) would interfere with his performance of duty as a member of the Army National Guard.

_____ _____
Date Signature of unit commander

6. Approval must be obtained from the USPFO of the respective State prior to repair or replacement of spectacles.

_____

* Indicate applicable portions.

(3) Loss of or damage to prosthetic devices is neither disease nor injury. Claims and vouchers pertaining to these devices will be adjudicated by the USPFO.

6. Authorization for Care. *a.* Medical care is authorized for members of the ARNG as outlined in *b* and *c* below. Emergency medical treatment may be obtained, as deemed appropriate by the unit commander, during training under sections 503-505 and for Guardmembers on orders for over 30 days performing duty under section 502, title 32, U.S.C., without regard to the line of duty determination. However, subsequent medical care, other entitlements, and responsibilities for payment of charges for care must ultimately be decided by the final line of duty determination.

b. In line of duty. Medical care is authorized for members who incur a disease or injury in line of duty under the following circumstances:

(1) When a disease is contracted or injury is incurred while enroute to, from, or during any type of training or duty under sections 503, 504, 505, and for Guardmembers on orders for over 30 days performing duty under section 502f of title 32, U.S.C. Such training includes, but is not limited to, annual training, maneuvers and field exercises, service schools, small arms meets, and FTTD under aforementioned sections.

(2) When an injury is incurred while engaged in any type of training under section 502 of title 32, U.S.C. Such training includes but is not limited to unit training assembly, multiple unit training assembly, and training in aerial flight, other than FTTD under 502f.

(3) While not on duty and while voluntarily participating in aerial flights in Government-owned aircraft under proper authority and incident to training, Guardmembers are authorized medical and dental care required as the result of an injury incurred in line of duty.

(4) Medical care is not authorized by army expense for members who incur an injury while enroute to or from any type of training under section 502, except for Guardmembers ordered to perform duty for over 30 days under section 502f of title 32, U.S.C.

Line of duty investigations and authorization for any medical treatment for conditions incurred while the members were performing REP 63 training in a Federal status, or training under title 10, U.S.C. are the responsibility of the Army Area commander under whose jurisdiction the member was training even though the individual may have returned to his National Guard status.

c. Not in line of duty. Members who incur an injury or contract a disease during any type of training or duty under sections 502f, 503, 504, or 505 of title 32, U.S.C., when it is determined to be not in line of duty, may be furnished medical care at Army expense during the period of training.

d. Members who incur an injury while in an armory drill status under section 502 of title 32, U.S.C., when it is determined to be not in line of duty, may not be furnished medical care at Army expense.

7. Medical Care Benefits *a.* Medical care benefits are provided as follows:

(1) A member of the ARNG who incurs a disease or injury under the conditions enumerated herein is

entitled to medical care, in a hospital or at his home, appropriate for the treatment of his disease or injury until the resulting disability cannot be materially improved by further medical care.

(2) Any disease or injury incurred by a member of the ARNG while receiving authorized medical care for a disease or injury incurred during the training period for which benefits are claimed will be investigated; and, if determined to be appropriate, a report will be submitted under NGR 600-3. If it is determined that the disease or injury was directly related to authorized activities surrounding the care of the original disease or injury, medical care may be continued in the same manner as if it had occurred during the training period.

b. When members who incur a disease or an injury during a period of training or duty under title 32, U.S.C. 503, 504, 505, or 502f are admitted to an Army medical treatment facility, and it appears that a finding of "not in line of duty" may be appropriate, a formal line of duty investigation should be promptly conducted, and a copy of the report furnished the treatment facility. If these findings result in a "not in line of duty" determination prior to the date the training is terminated, every effort should be made to assist the hospital concerned in disposing of the patient from the hospital by the date the training is terminated or as soon thereafter as he becomes transportable. Medical care furnished such member after the termination of the period of training is not authorized at Army expense unless the "not in line of duty" determination is ultimately reversed. The Individual may be furnished medical care at Army expense from the date the training is terminated to the date the member received notification of this action. Medical care received subsequent

to the member's receipt of such notification is not authorized at Army expense. In the event a line of duty investigation has not been made by the date the training is terminated, every effort will be made to arrive at a determination as soon thereafter as possible.

8. Procedures for Obtaining Medical Care. *a.* Individual responsibility.

(1) When a member of the ARNG incurs a disease or an injury, while performing training duty under sections 502-505 of title 32, U.S.C., he will, without delay, report the fact to his unit commander. Each member will be informed that it is his responsibility to comply with these instructions, and that failure to promptly report the occurrence of a disease or injury may result in the loss of medical benefits.

(2) In those cases where the disease or injury does not manifest itself until after the termination of the training period, the individual will consult his unit commander regarding the procedure necessary to determine his eligibility for medical care. Commanders will be guided by this regulation and NGR 600-2.

b. Authorization for care in civilian facility.

(1) An individual who desires medical or dental care in civilian medical treatment facilities at Federal expense is not authorized such care without written or verbal authorization by the Chief, National Guard Bureau or his designee, except in an emergency

(2) When medical care is obtained without prior authorization, the details will be submitted to NGB-ARS as soon as practicable. The notification of medical care will

be made following the format in the appendix. The notification will be reviewed by NGB-ARS and replied to as deemed appropriate.

c. Action by unit commander

(1) Medical care. Whenever an individual requests medical attention, the unit commander should take action to insure that the member receives medical care under the following conditions:

(a) Procedures for obtaining medical care.

1. The unit commander will refer individuals requiring medical care to a medical officer if available. In those cases where the medical officer recommends hospitalization or treatment, and in all emergency cases where the need for hospitalization or treatment is apparent, the unit commander may authorize medical treatment in a facility in the priority shown in paragraph 4*b*.

2. If the urgency of the situation indicates the necessity for immediate hospitalization and a Federal facility is not available, a civilian facility may be used; however, the patient will be moved to a Government hospital as soon as such movement can be accomplished without detriment to his health or recovery. In those cases where the medical officer recommends treatment by a civilian physicians or dentist, and in instances where there is no medical officer present, the unit commander may authorize the services of a local civilian physician or dentist.

(b) Written authorization. Prior to admission to or treatment of the ARNG member at a DOD medical treatment facility, the unit commander will furnish the

treatment facility a signed letter of authorization as soon as practicable. Authorization will include the following:

1. Full name, SSAN, grade, and organization of the patient.

2. Statement that patient is a member of the ARNG (designation of unit of assignment, station, and State).

3. Location of training site where disease or injury occurred.

4. Type of duty being performed.

5. Inclusive dates of training.

6. Statement that patient is authorized medical care under the provisions of paragraph 6.

7. Statement as to the line of duty status, if determined; otherwise, a statement "Line of duty status undetermined – being investigated."

8. Date of occurrence of disease or injury and diagnosis.

9. Brief and complete summary of events leading up to and surrounding the incurrence of injury or disease.

10. For non-DOD medical treatment facilities, the commander will furnish the facility commander with DA Form 4159 (Request for Medical Care in a Federal Medical Treatment Facility Outside Department of defense) in accordance with paragraph 15-3, AR 40-3.

(2) Notification. The unit commander will notify the State Adjutant General and NGB-ARS of all members

hospitalized beyond the end of the training period (format in the appendix).

d. Authority for further hospitalization or treatment. No member who has a disease or injury will be placed in a hospital or otherwise treated at Federal expense after termination of the training period, except in case of emergency, unless such treatment is authorized by the Chief, National Guard Bureau. A member of the ARNG already under medical treatment at the expiration of the training period may continue to receive the necessary treatment at Federal expense in accordance with paragraph 7. If treatment is discontinued, an authorization (the same as for an initial period) will be required before reviewing treatment for the same condition. Request for such medical care will be submitted to NGB-ARS and may be either written or verbal, depending upon the urgency of the situation.

e. Medical care for REP trainee personnel who incurred an injury or disease in line of duty while on their initial tour of ACDUTRA and who have since completed their ACDUTRA and have been returned to the ARNG is the responsibility of the Army Area commander of the major command under whose jurisdiction the ACDUTRA was performed. Requests for such care should be submitted to the appropriate Army Area commander, since the individual was in a Federal status at the time of the incident.

f. Unit commanders should authorize emergency medical care for individuals injured while in an authorized duty status. Written approval from the Chief, National Guard Bureau is not necessary, unless there is some question as to the line of duty status, or unless more than minor care will be required after the training period ends.

However, notification of the injury will be forwarded to NGB-ARS. Format shown in the appendix will be used for this notification. A Federal medical facility should be used whenever possible.

g. In the event an individual refuses to be moved to a Federal medical facility, he, or a responsible individual in his behalf, should be informed that by such refusal his entitlement to Federal benefits may and probably would be jeopardized.

9. Status While Undergoing Hospitalization. *a. General.* The ARNG status of an individual is not affected by virtue of his hospitalization. The provisions of AR 135-200 will apply. Determination of requirement for continued hospitalization will be made by the MTF commander. Paragraph 10 will apply when a final not in line of duty determination has been made. Under no condition will an individual be assigned to the medical holding unit of a hospital.

b. Separation while undergoing hospitalization in a military facility. Ordinarily a member will not be separated from the ARNG while undergoing hospitalization for treatment of a disease or injury incurred in line of duty. Any such member whose period of service will expire during the period of his hospitalization may, with his consent, be retained in the ARNG beyond the expiration of term of service (ETS) until the case is completed. No member may be held in the service beyond the normal ETS without his consent solely to effect his hospitalization. Whenever it appears that the term of service of a member of the ARNG will expire while he is hospitalized under the provisions of this regulation, the State Adjutant General will so inform the hospital commander concerned

with giving the date of the ETS. This notification should be forwarded at least 2 weeks in advance of the ETS. Individuals who do not consent to further hospitalization will be required to accomplish an affidavit to the effect that they do not desire retention in the service for continued hospitalization and possible separation or retirement for physical disability. If the individual refuses to accomplish the affidavit, a written report of such refusal will be made by the hospital commander and will be placed with the individual's records. The hospital commander will then inform the State Adjutant General of the desires of the individual. In those cases where the individual does not desire to continue hospitalization beyond his ETS, and in all cases where the individual refuses to sign an affidavit, hospitalization will be terminated on his ETS date. The State Adjutant General will then initiate action to accomplish discharge by reason of ETS under NGR 635-200.

c. Separation under other conditions. In all cases of individuals undergoing hospitalization in other Federal medical treatment facilities, civilian hospitals, or where it appears that an individual not in a hospital status is disqualified for further military service as a result of an injury incurred in line of duty, the State Adjutant General will request from Chief, National Guard Bureau, authority for hospitalization or transfer of the individual to an Army medical treatment facility for the purpose of appearing before a medical board and a physical evaluation board, if indicated, as provided in AR 635-40.

d. Conduct while undergoing hospitalization. Individuals who are undergoing hospitalization under this regulation will abide by the rules and regulations promulgated by the medical treatment facility and the instructions issued by the hospital authorities. Violations will be

reported to the State Adjutant General concerned, who will take necessary action.

10. Disposition of Hospitalized Cases. *a. Return to duty.* When it is determined that a hospitalized ARNG member has obtained the maximum benefits from hospitalization and there is no disability remaining from the condition from which hospitalized, he will be returned to his duty station or, if none, to his home of record at the time of entry into the hospital.

b. Retirement or separation. Retirement or separation for physical disability with or without severance pay, as provided by chapter 61 of title 10, U.S.C., is effected or authorized by the Department of the Army as a result of the action of any Army Physical Evaluation Board established under AR 635-40. Eligibility is limited to individuals disabled as a result of an injury incurred while performing any authorized training or duty, or as a result of a disease contracted while performing full-time training duty (other than duty for training under 10, U.S.C. 270(b)) under a call or order that does not specify a period of 30 days or less. Upon Department of the Army notification that an individual is to be placed on the Temporary Disability Retired List of the Army, retired for disability, or separated with or without severance pay, the following action will be taken:

(1) If an individual is to be retired for physical disability, the State Adjutant General will issue an order separating the individual from the Army National Guard. The effective date of the separation will coincide with the effective date of retirement. The separation order issued will specify the cause of retirement and will cite as authority the Department of the Army order affecting the retirement.

(2) If an individual is to have his name placed on the Temporary Disability Retired List of the Army, the State Adjutant General will issue an order separating the individual from the ARNG. The effective date of the State order will coincide with the effective date of the Department of the Army order.

(3) In the event an individual is to be separated from the military service with or without severance pay, the Adjutant General of the State concerned will be furnished appropriate information by the Department of the Army in order that he can effect the separation of the individual from the ARNG. The separation order issued will include the cause of discharge and will cite the Department of the Army authority that authorized the action.

c. Transportation. ARNG personnel who are furnished medical care under these regulations are entitled to transportation and travel allowances incident to such medical care, including transportation to the duty station or place of residence upon termination of treatment. When necessary, the State Adjutant General will furnish orders for such movement. Whenever State orders are used to effect medical care or to admit an individual to a hospital, the orders should include provisions for the return upon completion of hospitalization or treatment.

11. Payment for Medical Care. Payment for medical care obtained in accordance with this regulation will be accomplished as follows:

a. In military medical facilities, medical care is provided without charge except that officer patients must pay for their subsistence. The facility concerned will collect from the patient.

b. In Government medical facilities other than those stated in a above, the following procedures are applicable:

(1) Subsistence charges:

(a) Subsistence charges for officers hospitalized in Public Health Services (PHS) facilities will be collected from the officers by the PHS facility concerned.

(b) Subsistence charges for officers hospitalized in other Federal medical facilities will be collected from officers by Commander, US Army Health Service Command, ATTN: HSCM, Fort Sam Houston, TX 78234.

(c) Subsistence charges for enlisted personnel are an element of the per diem inpatient reimbursement rate and no separate collection action is required.

(2) Medical care (inpatient and outpatient) charges: Standard Form 1080 vouchers covering charges for medical care will be prepared by the Federal medical facility concerned and forwarded directly to the Commander, US Army Health Services Command, ATTN: HSCM-A, Fort Sam Houston, TX 78234, for settlement. The vouchers will be substantiated by the signed request for treatment by the unit commander. (Vouchers for medical examinations performed for members and prospective members of the Army National Guard will be forwarded to the State concerned for payment.)

c. In civilian hospitals or by civilian agencies, physicians, or dentists.

(1) Charges for civilian care are not properly payable from Federal funds for treatment of disease manifested during inactive duty training (32 U.S.C. 502), except for individuals ordered to perform duty for periods

of more than 30 days under 502f, and other exceptions outlined in paragraph 4-2*a*(3), AR 40-3.

(2) Itemized DA Form 3928 (Public Voucher for Medical Service) Should be prepared in accordance with chapter 17, AR 40-3, and forwarded to NGB-ARS for approval, except as shown in (3) below. A completed copy of both the DA Form 2173 and the line of duty status will be attached to the voucher.

(3) The USPFO's are designated to approve vouchers for civilian medical care subject to the following limitations and provisions:

(a) The treatment must have been rendered at a charge of $2,500.00 or less.

(b) The voucher is supported by a certificate signed by the member's unit commander, as provided in paragraph 8, when appropriate.

(c) The condition has been found to be in line of duty by the final approving authority, or

(d) Regardless of the line of duty status of the injury or disease, when all of the medical care covered by the voucher was furnished during a training period authorized by sections 503, 504, or 505 of title 32, U.S.C., or

(e) For cases where an administrative determination has been made, when the total cost of further treatment is $100.00 or less.

d. Reimbursement for payment.

(1) Reimbursement to insurance agencies is not authorized.

(2) Itemized SF Forms 1034 (Public Voucher for Purchase and Services Other than Personal) (chap 15, AR 40-3) should be prepared and forwarded to Chief, National Guard Bureau (NGB-ARS-MS) for authority to reimburse individuals who have paid for civilian medical treatment only when amount exceeds $200.00. The USPFOs are designated to authorize reimbursement in amounts of $200.00 or less.

12. Pay and Allowances. See NGR 37-104-2.

13. Requirements for Immunization. *a.* Immunization and reimmunizations will be administered in accordance with AR 40-562.

b. Record of immunizations and reimmunizations will be recorded on SF 601.

c. Maintaining a PHS 731 is not required unless so designated by the State Adjutant General, except that PHS 731 will be completed for all personnel prior to mobilization.

14. DD Form 689 (Individual Sick Slip). The DD Form 689 will be prepared whenever a member of the ARNG on full-time training duty or inactive duty training has requested or received medical attention. AR 600-6 will be used as a guide in the preparation of the form. The diagnosis will be entered under "Remarks" by the medical officer whenever appropriate, The form serves as an authorization by the unit commander for the individual to report for sick call and is used as a medium of interchange of information between the unit commander and the medical officer. DD Form 689 will be maintained in the MPRJ as a permanent record when it is determined that a

line of duty and/or administrative determination may be required.

AFFIDAVIT OF BILL BURKETT

THE STATE OF TEXAS

COUNTY OF TAYLOR

"My name is Bill Burkett. I am mentally competent. I have never been convicted of a crime involving moral turpitude, I am over 18 years of age, and I have direct knowledge of the facts that I am setting forth in this affidavit.

I was a member of the Texas National Guard before being medically retired as a result of this disease. One of my duties as an officer in that organization was to conduct strategic planning and efficiency studies of the Texas National Guard. These studies threatened the status quo of the Guard, and earned me the animosity of numerous members of the upper echelon of the Guard; including Colonel William Goodwin, Colonel Jackie Taliaferro, and Colonel Archie Meador. My immediate supervisor (rater) was COL Archie Meador, and my senior supervisor (senior rater) was COL William Goodwin.

I was serving on Title 32 active duty in the Texas National Guard on January 17, 1998. I traveled to Panama under federal travel orders. I was not under federal duty work orders with the Texas National Guard at any time. I was returning to Abilene, Texas that day from an assignment in Panama when I collapsed at the Abilene Regional Airport in the baggage claims area. I was unconscious for approximately one minute.

My wife picked me up at the airport and we went home. I believed at this point that I was suffering from fatigue and a case of the flu. After attempting to notify my supervisor Colonel Meador, I notified Colonel John Wells,

his second in rank on January 20, 1998, that I was unable to drive to Austin and resume my duties at Camp Mabry. Colonel Wells then stated that I should seek treatment at Dyess Air Force Base outside of Abilene. I responded that I would do so if my condition did not improve over the next couple of days.

My condition deteriorated over the course of January 21 and January 22, 1998. I suffered from severe and constant fever, bouts of nausea, dizziness, and what was later diagnosed as seizures. I related these facts to Colonel Wells and he suggested again that I seek treatment at Dyess Air Force Base. I sought admittance to Dyess base hospital on January 26, 1998, and I was informed at the admissions office that I needed a commander's authorization to be admitted.

I contacted Lieutenant Colonel Dennis Adams, concerning my need for this authorization. Lieutenant Colonel Adams stated that he would complete all the necessary paperwork once Colonel William Goodwin and Colonel Archie Meador approved such action. I passed this information onto Colonel Wells, who had continued to try to obtain medical care for me. Colonel Wells later informed me that Colonel Goodwin and Colonel Jackie Taliaferro had declined to take such action on my behalf.

My medical condition continued to decline as all these events transpired. I contacted Chief Warrant Officer George Conn, an expert on personnel issues, concerning how I could obtain medical treatment. Warrant Officer Conn advised me that National Guard regulations and Texas state law provided such care. Warrant Officer Conn emailed a response to me concerning my plight that suggested several routes I could take to obtain the military

medical care I was entitled to receive. Warrant Officer Conn was ultimately the victim of retaliation for his efforts to assist me. These acts of retaliation forced him to resign from the guard. Within this timeframe, approximately April 1, 1998 Colonel Wells told me that he had been relieved of responsibility regarding my case and that all contact would now be through Colonel Taliaferro.

I ultimately received military medical care, but not until United States Congressman Charles Stenholm intervened on my behalf. I continue to suffer from debilitating headaches, seizures, nausea, and mobility impairments. I have difficulty concentrating, which makes reading difficult for me.

I fully accept workplace animosity as a fact of life. The petty and vindictive acts of Colonels Goodwin, Meador, and Taliaferro in this case go above and beyond instances of such animosity because their actions and inactions placed my life in jeopardy, and I continue to live with the effects of those acts to this day.

Everything contained in this Affidavit is true and correct according to my personal knowledge.

/s/ Bill Burkett
Bill Burkett, Affiant

Before me, the undersigned authority, personally appeared Bill Burkett, who stated upon his oath that his above and foregoing testimony is true and correct.

Subscribed and sworn to me on this 14 day of February, 2001.

/s/ Francesca Helm
Notary Public in and for
the State of Texas
My commission expires:
09/07/04

[SEAL] FRANCESCA HELM
Notary Public,
State of Texas
My Commission
Exp 09-07-04

AFFIDAVIT OF GEORGE O. CONN

THE STATE OF TEXAS §
§
COUNTY OF Dallas §

BEFORE ME, the undersigned authority, personally appeared George O. Conn, who, being by me duly sworn, deposed as follows:

My name is George O. Conn. I am currently on active duty with the United States Army, assigned in Germany. My address as of the date of the preparation of this affidavit is CW3, George O. Conn; 1st PERSCON, TAPOD; Unit 29058; APO AE 09081; my permanent address is P.O. Box 891, Cedar Hill, Texas 78106-0891. I am of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated, which are true. This affidavit is given freely and voluntarily. I have never been convicted of a felony. My date of birth is 4/9/42.

I am personally acquainted with LtC Bill Burkett, and I have personal knowledge of the following facts.

I first met LtC Bill Burkett about 1994 or 1995 when we were on Active Duty Special Work (ADSW), Texas Army National Guard, Austin, Camp Mabry, Texas. We were cubicle mates, his desk being just across from where I worked. We both worked there until about January of 1998 when he got sick.

My rank is Chief Warrant Officer 3 (CW3). A "warrant officer" is an officer who is considered a subject matter expert within their assigned technical field, while a non-warrant commissioned "officer" has more typical "leadership" responsibilities. A warrant officer can certainly lead combat units, but that function is more typically assigned

to commissioned officers who generally have training in combat functions. My MOS (Military Occupational Specialty) is 420A, an Administrative Technician warrant officer, i.e. a personnel expert. Other examples of warrant officers are food service, logistics, maintenance, military intelligence, and aviation.

My experience and training that qualify me in my current rank include the completion of Officer Candidate School in 1968, various administrative assignments in the National Guard over a 15-year period as a full time Technician (commissioned and as an enlisted man), and the completion of the warrant officer technical and tactical certification course about 1992.

I am also aware of and experienced with Army Regulations dealing with medical care including AR 40-3, AR 135-381, both due to my assignment as Command Administrative Officer and as a Warrant Officer within the technical field of administration over the last 28 years of my military service.

I am what could be called a senior military technician, based on my training and past experience and years service. I served in proximity to LtC Bill Burkett over a period of about three years, and I have known COL William W. Goodwin, COL Jackie L. Talliaferro [sic], and COL Archie M. Meador (Jr.) for a number of years (all have O-6 rank designations, the pay grade just below a one star general). I understand that William W. Goodwin, Jackie L. Talliaferro, and Archie M. Meador (Jr.) are Defendants in a suit that has been filed against them by LtC Bill Burkett, specifically a suit in the 126th Judicial District Court, Travis County, Texas, Cause No. GN-000159.

My professional relationships with some of the Defendants goes back over 30 years. COL Taliaferro and I were together in the same class at OCS in 1968, and since then I have worked under him for several years in military support to civil authorities activities or events. COL Meador and COL Goodwin and I have crossed paths during our careers with the Texas Army National Guard prior to my service at Camp Mabry when I reenlisted in 1989. LtC Bill Burkett started at Camp Mabry sometime about 1995. COL Goodwin was the Chief of Staff, subordinate only to the Adjutant General, who was General James. COL Taliaferro was the Personnel Director, COL Meador headed up the Plans, Operations and Training Directorate. About the time that LtC Bill Burkett came to Camp Mabry, I was working in the chain of command under COL Meador.

My work station was in direct contact with LtC Bill Burkett's (within ten feet of each other in the next aisle, such that we would be able to chat from our chairs on a regular basis during work) which allowed me to have regular visual contact, access and knowledge of many events regarding LtC Bill Burkett that I might otherwise not have witnessed. Additionally, as a smoker, I was sought out regularly by COL Meador on smoke breaks almost every day when we would typically make small talk. On occasion, COL Meador would make comments about work events, including at times occurrences about the activities of LtC Bill Burkett. COL Taliaferro was a civil service technician who usually did what he was instructed to do by the Chief of Staff. It is my opinion that, based on my experience and observations, that what happened to LtC Bill Burkett was directed by COL Goodwin, with assistance by his protégée COL Meador. COL

Meador was technically LtC Bill Burkett's supervisor. During this time my cubicle was in the same building as the three defendants. I have already discussed the regular informal contacts that I had with COL Meador, and, in addition to being LtC Bill Burkett's immediate supervisor, he was my senior rater. I had a continuing professional relationship during this time with COL Taliaferro, partially based on my previous work relationship under him. COL Goodwin, as the Chief of Staff, was a person that I did not meet with unless I had to, but I saw him frequently in the building and regularly interacted with him in the context of reports that I made, and instructions I received, through the chain of command.

LtC Bill Burkett's job evolved into a position where, as an administrative management "efficiency" expert, he conducted a management study of the Texas National Guard. He ended up pinned between two management systems, the more "political" chain of command lead by AG James (which wanted the efficiency study) and the chain of command headed by the Chief of Staff, COL Goodwin (which might have construed the management study as a treat to the status quo). It is a little misleading to understand the National Guard chain of command as a unitary structure leading from the lowest ranking soldier through the Chief of Staff to the Adjutant General. In fact, the Adjutant General, as a part time political appointee, was more under the authority of the state government, while the Chief of Staff, as a full time soldier, had more authority under the federal/army chain of command structure.

I remember at least one smoke bread [sic] that I took with COL Meador before LtC. Burkett went to Panama, but after he completed his management study, COL Meador informed me that it would not be in my best

interest to do anything that could be construed as assisting LtC Burkett. The indication was that it would not be "career enhancing" and he may even have used those words. I viewed it as a threat against me, and a promise that more adverse action was to come against LtC Burkett. It was my experience that COL Meador would not have said anything like that unless COL Goodwin had discussed the issue with him as his point of view.

My technical duty assignment during this time within the Texas National Guard was based on and because of my qualifications as an administrative/personnel expert. Indeed COL Meador and COL Taliaferro used my expertise and advice in these areas on a regular basis.

In my opinion, LtC Bill Burkett may have been one of the most energetic people and thinkers that I have ever been around. I found him to be extremely honest, and his analytic ability regarding any organizational process was the best I had ever seen. His work habits and activities were always of the highest professional standards.

I was aware that LtC Bill Burkett was assigned to temporary duty about late 1997 of short duration for a management study in Panama. He came back to the United States in early 1998 and returned to his hometown in Abilene, Texas. I heard about his illness when he called me and told me that he had passed out at the airport in Abilene, within a few days after that event occurred. Then a few days after that he called and told me that he was still unable to receive medical care. I don't remember exactly the reason at that time, but it had to do with the procedural difficulty in getting written authorization from his unit that he was in service and was therefore authorized to get medical treatment. At that time I told him that

he was clearly authorized to receive such medical treatment because any member of the military force who is injured, contracts a disease, the whole nine yards, i.e. any training status, is authorized for medical treatment. If there is any question, the medical treatment should be given, subject to a subsequent investigation and/or determination as to what line of duty the person was in at the time of the injury. After the initial information about his illness, I eventually became aware that his illness was growing worse, by way of direct communications with LtC Burkett, both on the phone and via email, and through third parties who reported to me about his detiriating [sic] condition.

I knew about the financial condition of LtC Burkett during the time of the onset of his illness. It was general knowledge among the full time work force chief of command during this time that they were aware both of his financial status and that he was in need of medical care. LtC Burkett and his wife had a ranching or farming operation near his hometown of Abilene and, due to drought conditions, they were in the process of losing their ranch and were on the verge of being forced into bankruptcy. As a result, he had no funds for any private medical care, as COL [sic] Burkett and I discussed at the time. I mentioned this status to COL Wells, i.e. that LtC Burkett was looking at bankruptcy issues. When I talked to COL Wells about my opinion regarding the blocks that were placed in the way of LtC Burkett receiving medical care, COL Wells gave me no specific response to my observation. It was also well known that Dyess Air Force Base Hospital was the closest medical facility to LtC Burkett's home.

I also informed LtC Burkett at the time of his initial injury that army regulations for the National Guard authorized retaining a person in an ADSW (Active Duty Special Work) status when that soldier had incurred an illness or disease while in on-duty status, as was the case with LtC Burkett. It may be that the soldier might be placed in another type of pay status, but the point is that he would continue in the service while he received medical treatment for the on-duty injury. This regulation could only be superceded if the soldier waived his right to such continued service and treatment in writing. I believe the regulation is covered in the AR 135 series, I think AR 135-381. I also told LtC Burkett that he could get relevant publications from the closest unit to him, the Abilene Armory.

The right to medical treatment in this situation is an entitlement, not subject to discretionary review by anyone in the injured person's unit, or the command structure above that. If anyone hinders such medical treatment, they are operating outside legitimate purview of the relevant military regulations and without authority.

AR 40-3 and AR 135-381 governs the entitlement and/or authorization of such military personnel for medical treatment or medical care, either for private medical care or military facility medical care. There are form and instruction materials distributed to Texas National Guard units, that the defendants are well aware of, that show that such medical care is mandatory. The above regulations are essentially standing orders for such medical care.

After the second telephone call from LTC Bill Burkett, I talked with COL John Wells, and stated my opinion that medical care was authorized in this case. I believe at that

time he had been designated as the point of contact in our directorate for such matters. I also told the same to COL Meador. I usually did not expect an immediate response to such unsolicited opinions, and do not remember getting any. A line of duty investigating officer was appointed, but I do not remember the outcome of any such investigation.

About that time, COL Taliaferro became the point of contact for any matter concerning LTC Burkett. I am sure that I spoke to him about LtC Burkett's medical condition, but I do not remember when or the specifics. It was usually the case that the point of contact in such cases is the unit commander, i.e. in this case, MAJ Lisa Hines. I do not know why she was not utilized in this case. Another option might have been CW4 Dewaine Brautigan, the senior full time personnel technician in COL [sic] Burkett's unit of assignment. I do not know why he was not utilized in this case. Based on my experience, this non-routine selection of the point of contact indicated that LTC Burkett was being singled out for special negative treatment and to take any action that would indicate any association with him would be detrimental to one's quality of life in the service, both in the present and future.

When I was assigned to a battalion as the Command Administrative Assistant, i.e. in the First Battalion, 143rd Infantry, for about seven years until about 1979, I was the senior technician for making decisions for soldiers that were injured or diseased in the line of duty or while performing duty. In my experience and expertise, there is no discretion, according to Army and National Guard regulations, that anyone in the command structure has to prevent someone who is injured or diseased in the line of duty, as was LtC Burkett, from receiving emergency

medical care. I was probably involved in hundreds of line of duty (LOD) determinations during that period of time.

I was working in San Antonio on a demobilization issue in early to mid-1998. In the evening while at the hotel I was staying at I emailed a note to LtC Burkett about his general situation. I used a National Guard computer to send the email. I do not remember what I sent to LtC Burkett, but evidently later someone (I think the information was routed through LtC Haddox), was looking on that laptop computer's C-drive, and found the email. The message was evidently construed to be negative towards the AG and/or Governor Bush. I did not think anything of it at the time. The first thing I knew about it's [sic] possible negative consequences was that I was called to a meeting at the office of Chief of Staff Goodwin on June 7, 1998 (it was a Sunday). I was totally surprised to find that I had been called to a formal meeting with a tape recorder, the Chief of Staff, a JAG officer, and COL Meador. I do not recall the exact sequence of events but the meeting was between five and ten minutes, a short meeting. COL Goodwin informed me that I was being released from my ADSW status effective immediately, I was informed that I had the right to an attorney, and COL Hajl, the Senior JAG officer at Camp Mabry, showed me a piece of paper and asked me if I recognized the AOL message. I said "Yes, Sir." It was an AOL message from me to LtC Burkett that I had sent from the San Antonio hotel. I think it was the Chief of Staff that had told me that the message was negative to the AG or Governor Bush. I did not ask any questions.

After the initial meeting, I met for about 15 minutes with the attorney that was assigned to me, a Major whose

name I do not remember, and I told him that I had nothing to say. My attorney did not know anything about why I was being dismissed. My attorney and I returned to the conference room, and I said that I had no comment, and the meeting was adjourned.

I worked that next Monday morning and left Camp Mabry that afternoon. I was on active duty with leave through the latter part of June, about June 23, 1998. I resigned from the National Guard then and was appointed to the U.S. Army Reserve, and took up a new assignment on July 24, 1998.

Because of my experience, education, and training, I believe that I was dismissed because of my support for LtC Burkett.

Everything contained in the Affidavit is true and correct according to my personnel [sic] knowledge.

/s/ George O. Conn
Affiant

I witnessed the signature of the affiant and the initialing of each page attached to this affidavit. SIGNED under oath before me on June 7, 2000

[SEAL]	CAROLYN J. GREEN Notary Public, State of Texas My Comm. Expires Aug. 6, 2003	/s/	Carolyn J. Green Notary Public, State of Texas My Commission expires: 8-6-2003

Ken Owen & Associates

Certified Shorthand Reporters

NO. GN-000159

BILL BURKETT Plaintiff, v. WILLIAM W. GOODWIN, JACKIE L. TALIAFERRO AND ARCHIE M. MEADOR Defendants.	)))))))))	IN THE DISTRICT COURT 126TH JUDICIAL DISTRICT OF TRAVIS COUNTY, TEXAS

* *

ORAL DEPOSITION OF

COLONEL JOHN WELLS

FEBRUARY 9, 2001

* *

ORAL DEPOSITION of COLONEL JOHN WELLS, produced as a witness at the instance of the PLAINTIFF, and duly sworn, was taken in the above-styled and numbered cause on the 9TH day of FEBRUARY, 2000, from 2:01 p.m. to 3:13 p.m., before Suzanne T. Lane, RPR, CSR in and for the State of Texas, reported by machine shorthand, at the Law Offices of Ken Owen & Associates, Certified Court Reporters, 801 West Avenue, Austin, Texas, pursuant to the Texas Rules of Civil Procedure and the provisions stated on the record or attached herein.

801 West Avenue
Austin, Texas 78701-2169
(512) 472-0880
Fax 472-6030

Dallas

[7] to remember

Q Sure.

A In that position, my line was a direct line in from the outside.

Q Do you recall what he told you?

A The best I can remember that particular day is he said he had just gotten back from Panama, and while he was trying to collect his luggage at the airport – I do not know which airport he was talking about – that he had collapsed, that he was having dizzy spells, and he would not be in.

Q Do you recall what you told him?

A I told him that I would inform Colonel Meador. I do not remember any more to the conversation. I assumed, you know, that he would go to the doctor.

Q And you said previously that you did inform Colonel Meador. Is that correct?

A Yes. Every time Bill called in, I informed Colonel Meador.

Q On that date, January 20th, you went to Colonel Meador?

A Yes.

Q Do you recall what Colonel Meador told you?

* * *

[10] I believe I questioned him and said, well, have you seen a doctor. And then that's when he told me of the

financial strain that he was in; that he was about to lose everything; that he could not afford to see a doctor.

Q So you asked him, had he seen a private doctor?

A Yes.

Q Did you ask him if he was entitled to a doctor from the National Guard?

A No, I didn't.

Q Were you aware of his duty status, Mr. Burkett's duty status?

A I was aware of the type status he was in, which is 12b mandate, which is a temporary, usually time-sensitive, special project. It is not considered full-time employment.

Q But it's considered active duty?

A Yes.

Q Are you aware if he was entitled to medical care provided by the National Guard?

A He should have been if he was on active duty. But here again, I did not question what source he was going to see.

Q But you did mention his financial status,

* * *

[31] Bill Burkett ask you for medical care – for you to approve his medical care?

A Here again, I do not believe Bill asked me in that form to approve his medical care, because I did not have approval authority.

Q Did he tell you –

A I did assist him in getting medical care through that whole process, though, through this time period.

Q Did he tell you he needed medical care?

A Yes, he did, and that's when I started getting involved in the process to try and get him in to see a doctor.

Q And do you recall that date? Was that before the LOD?

A It would have been before the LOD, but it was – it would have been after he informed me that Dyees wouldn't see him, which was probably that last week in January.

Q Did you tell Colonel Meador that Bill Burkett was requesting medical care?

A I do not recall if I did or not. I may have, but I do not recall where I could say yes or no.

Q Did you tell Colonel Meador everything

* * *